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IN THE

Supreme Court of the United States

October Term, 1969

No. 992

NEW YORK FEED COMPANY, INC., and
STEPHEN HELLER,

Appellants,

vs.

HOWARD R. LEARY, Individually and in his capacity as Police Commissioner of the City of New York, and FRANK S. HOGAN, individually and in his capacity as District Attorney of New York County,

Appellees.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Jurisdictional Statement

Appellants' appeal from the judgment of a three-judge District Court convened in the Southern District of New York and entered on October 15th, 1969 denying an interlocutory and permanent injunction against the appellees and other relief, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the three-judge District Court is reprinted as Appendix "A" and, as yet, is unreported.

Jurisdiction

This suit was brought under Title 28, United States Code, Sections 2281, 2284 and Title 42 United States Code, Section 1983 to enjoin the appellees from interfering with the appellants' constitutional right to distribute their newspaper and to declare Section 235 of the New York Penal Law unconstitutional as being over-broad and as being unconstitutionally applied. A three-judge court was convened pursuant to Title 28, United States Code, Section 2281 composed of Wilfred Feinberg, United States Circuit Judge for the Second Circuit Court of Appeals; and Thomas F. Murphy and Marvin E. Frankel, District Judges of the United States District Court for the Southern District of New York. The judgment of the three-judge District Court was entered on October 15, 1969 and notice of appeal was filed in that Court on October 27, 1969.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on direct appeal in this case: *Dombrowski v. Pfister*, 380 U. S. 479 (1965) and *Zwickler v. Koota*, 389 U. S. 241 (1967).

Question Presented

Where state officers have restrained the circulation of an allegedly obscene "underground" newspaper by making massive arrests of its newsdealers and by threatening to arrest many others for its sale, without holding a prior

adversary hearing on the issue of obscenity, should a Federal Court, under the requirements of the First Amendment, enjoin such conduct?

Constitutional Provisions and Statutes Involved

AMENDMENT I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 235.05 Obscenity.

New York Penal Law.

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, an obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Section 235.10 Obscenity; presumption.

New York Penal Law.

1. A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

Statement

The facts relevant to the constitutional issues presented by this appeal have their origin in a series of massive

arrests of persons engaged in the sale and distribution of certain tabloid newspapers in New York City. The appellants are the New York Feed Company, Inc., the corporate publisher of *The New York Review of Sex & Politics* (hereinafter referred to as *The Review*), and Stephen Heller, 20 years of age, who is the individual publisher.

The appellees are the District Attorney of New York County, the Commissioner of Police of the City of New York, and the Attorney General of the State of New York.

The New York Review of Sex & Politics

The Review is a bona fide newspaper which has as its sole purpose the furnishing of information to the public relevant to current issues of the day. Articles in *The Review* are well written by authors of stature and, with but rare exception, they contain no socially unacceptable language. The photographs in *The Review*, although occasionally displaying men and woman in the nude, do not depict any sexual acts.

Issues number 9 and 12 of *The Review* (which were the subject of the arrests complained of here) contain articles which discuss recent motion pictures, such as *Midnight Cowboy* and *Lonesome Cowboy;* comment on New York City's war on the underground newspapers; analyse the soft drug problem in the City of New York; examine the recent homosexual revolt; criticize the war in Viet Nam; consider the use of sex today in rock and roll music; and review a recent ballet performance in New York City (C. pp. 2-8)[1].

Newsweek Magazine; in an article discussing the so-called "underground newspapers", said that *"The New York Re-*

[1] Refers to appellants' complaint in District Court where there is a complete listing of each and every article contained in Issues No. 9 and 12 of *The Review.*

view of Sex & Politics makes . . . at least some effort to run material of redeeming value (one series: *What the New York Mayoral Candidates Think About Censorship*); . . ." (C. p. 8).

Pardon Magazine, a leading German satire monthly, described *The New York Review of Sex & Politics* as the "best" of the so-called underground newspapers (C. p. 9).

Ramparts Magazine, discussing *The New York Review of Sex & Politics* said: ". . . [It] does contain some straight reporting (for example, a report on the press conference held by Teenagers for Decency) which pads as much as it informs, and appears to reflect the ambivalence of the editors, who do seem more political than some of the others" (C. p. 9).

Although the publication of *The Review* was first launched on February 1st, 1969, by June of that year its circulation had grown to over 35,000 in New York City alone (Affidavit of Stephen Heller, paragraphs 2 and 13).

The Massive Arrests and Prior Restraint

On June 26th, 1969 Stephen Heller, Sam Edwards (one of the co-publishers) and Al Druss (the President of *The Review's* distributing company, G. I. Distributors, Inc.) and a large number of newsdealers were arrested and charged with violations of Section 235 of the New York Penal Law[2] (C. p. 5). The appellants, Sam Edwards and Al Druss were all arrested on warrants issued, on an *ex parte* application made by the District Attorney to a Criminal Court Judge in the City of New York.[3] No warrants were issued for the arrests of the newsdealers. A large

[2] Section 235 makes it a crime to publish, distribute or sell an obscene publication.

[3] Affidavit of Patrolman, Donald Gray, sworn to on September 11th, 1969.

number of newsstand dealers were arrested simply because they had on display *The Review* or one of the other tabloid newspapers which were the target of similar attacks[4] (C. p. 5).

Prior to the massive arrests of June 26th there were 193 newsstands in New York County which handled *The Review* (C. p. 5). After this sweeping police action approximately 60 newsstands refused to handle the next issue of *The Review* for fear of being arrested (C. p. 5).

On August 15th, 1969 the police struck again arresting the appellant and Sam Edwards along with approximately 70 newsstand dealers for the sale of Issue No. 12 of *The Review* (C. pp. 6, 10). The same procedure was followed of securing arrest warrants for the appellants and Sam Edwards on an *ex parte* application and once again the police avoided the inconvenience of securing arrest warrants for the *70* newsstand dealers who were arrested on that same day for displaying on their stands these tabloid newspapers.[5] After the massive arrests of August 15th, which exceeded those of June 26th, only about 50 newsstands of the original 193 would handle *The Review* (C. p. 10). Of the 10,000 issues of *The Review* that were sent out to newsstands throughout New York County (Manhattan) the week after the August 15th arrests over *8,000* were rejected outright by the news dealers because they were fearful of being arrested again (C. p. 10).

As a result of the police tactics employed against *The Review* its circulation, which was once 35,000, was reduced to less than 5,000 (Affidavit of Stephen Heller, paragraph 13).

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[4] At the same time warrants of arrest were issued for *The Review* other warrants were secured, in the same manner, for the publishers of the tabloid newspapers entitled *Screw*, *Pleasure* and *Kiss*.

[5] Some of these newsdealers were blind and disabled. See affidavit of Attorney Ralph J. Schwarz, sworn to on September 30th, 1969.

The appellees, in their answer to the appellant's complaint, did not deny the drastic drop in the circulation of *The Review* but only denied knowledge sufficient to form a belief. They admitted to the arrest of at least *50* news dealers of which 25 involved *The Review* and *Screw*.[6]

Police Threats to News Dealers

In addition to the massive arrests which reduced the circulation of *The Review*, news dealers were individually threatened by New York City police officers and told not to handle any of the so-called underground newspapers or they would be arrested. This concerted effort on the part of the police is detailed in the affidavit of Dan Mouer, the circulation manager for *The Review*, and was undenied by the appellees.[7]

When the first group of arrested news dealers were brought to court, after the June 26th raids, a member of the New York County District Attorney's staff issued the following threat to the news dealers:

> I state unequivocally for the record that any individual, including all newsstand operators, who sell or offer to sell these publications, now ruled obscene acts at his own risk as the agent of these defendants and renders himself liable to swift forthwith arrest of violations of this state's obscenity statute (C. p. 6).[8]

Dan Mouer, in his affidavit, describes in great detail, giving places and locations, 26 different instances where newsstand dealers were actually threatened by the police

[6] Lieutenant Ralph Russo's affidavit dated September 23rd, 1969. In a later affidavit dated September 29th, 1969 he indicated that there were only 18 arrests of *The Review* and *Screw*.

[7] Dan Mouer's affidavit is filed with the Record on Appeal in this case.

[8] "These publications" refer to the tabloid newspapers heretofore described. The statement "ruled obscene" had reference to the *ex parte* determination of a criminal court judge.

that if they handled *The Review* they would be arrested. In his affidavit he quotes from an article in the *New York Post*, dated July 15th, 1969 which reads as follows:

> In May and June several issues of *The Reviews* were called obscene by the police, their editors arrested, as detectives fanned out across the city pulling copies of *The Reviews* off the newsstands. Several dealers were also arrested and ordered to appear in Court.
>
> When asked why they no longer carried *The Sex Reviews*, newsstand dealers, particularly in the 86th Street area, say that both uniformed and plain clothed police have warned them of the risk of arrest on obscenity charges if they sell the tabloids.

Dan Mouer clearly states that since these threats have been made to the newsstand dealers they have refused to carry *The Review*.

The affidavit of Irving Gertsman, Assistant Corporation Council of the City of New York, dated October 3rd, 1969, and offered in response to the affidavit of Dan Mouer, only complains that the information contained in the Mouer affidavit is hearsay but significantly does not deny in any fashion the facts set forth in the Mouer affidavit.

Federal Action

Because of the drastic restraints imposed upon *The Review*, which has stifled its circulation and distribution, the appellants were forced to initiate a suit under Section 1983 of Title 42 which sought to enjoin the appellees from arresting or threatening to arrest the appellants and their news dealers for the sale of *The Review* without first conducting an adversary hearing on the question of the challenged publication's alleged obscenity. A three-judge court was convened at appellants' request to assess the constitutionality of Section 235 of the New York Penal Law,

which was challenged as being overbroad and misapplied and Sections 148 through 150 of the New York Code of Criminal Procedure because they failed to provide for an adversary hearing in advance of a person's arrest for the sale of an obscene publication. The case was heard before Judges Wilford Feinberg, Judge of the United States Court of Appeals for the Second Circuit, and Thomas F. Murphy and Marvin E. Frankel, District Judges of the United States District Court for the Southern District of New York.[9]

Decision of the Court Below

On October 15th, 1969 the three-judge District Court in a lengthy opinion rejected appellants' claims that Section 235 of the New York Penal Law was overly broad and had been misapplied and held it to be constitutional.

Although recognizing that body of authority requiring an adversary hearing prior to the restraining of the circulation of literature, they elected not to follow that rule. In discussing appellants' claim that a prior adversary hearing was a constitutional prerequisite to the interruption of a newspapers' distribution the District Court specifically held:

> The argument is not merely plausible; it has won approval in several courts. *Delta Book Distributors v. Cronrich, Inc.*, ____ F. Supp. ____ (E. D. La. 1969) (three-judge court); *Cambist Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N. D. Ill. 1968); *Sokolic v. Ryan*, Civ. No. 2501 (S. D. Ga., 9-18-69).[11] But decisions we believe to be sounder, at least in the present state of learning, go the other way. *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Rage Books*

[9] At the same time *The Review* instituted its lawsuit another one of the tabloid newspapers entitled *Screw*, *the Sex Review* also brought an action under the same federal provisions. These actions were consolidated and argued together.

Inc. v. Leary, 301 F. Supp. 546 (S. D. N. Y. 1969), appeal pending; *Astro Cinema Corp., Inc. v. Mackell*, 69 Civ. 778 (E. D. N. Y., 8-19-69); *The East Village Other, Inc. v. Koota*, 68 Civ. 125 (E. D. N. Y. 2-13-68). In the respect here pertinent, we join the latter group.

The District Court further found that there was no extraordinary need to justify the granting the relief requested under Section 1983 and indicated that since appellants had not pursued their claims in the State courts Federal intervention should be avoided. Thus the Court below denied all of the injunctive relief requested by the appellants.

On October 27th a direct appeal to this Court was duly filed.

THE QUESTIONS ARE SUBSTANTIAL

I. Under the requirements of the First Amendment State officers cannot restrain the circulation of an allegedly obscene underground newspaper, by making massive arrests of its newsdealers and by threatening to arrest many others for its sale, without conducting a prior adversary hearing on the issue of obscenity.

This appeal presents a very grave question affecting a citizen's right to freely distribute a newspaper and the public's right to read it, never before decided by this Court. In other words, is this Court's ruling that the distribution of any allegedly obscene literature shall not be interrupted unless preceded by an adversary hearing on the issue of the publication's alleged obscenity, to be applied to restraints caused by massive arrests and threats to arrest made against newsdealers? This clearcut question presented here has never been decided by this Court. Thus, the

District Court below, by ignoring the adversary hearing rule, has created a new problem which this Court is obligated to resolve if the press of this country is to remain free.

The substantiality of this question is signified by this Court's noting an appeal in *Batchelor v. Stein*, No. 565 (Oct. Term 1969) wherein one of the questions presented was:

> Where "underground" newspaper publishers who face prosecution under an allegedly unconstitutional Texas obscenity statute entitled to federal injunctive relief under *Dombrowski v. Pfeister?*

Since a closely related question, if not identical, is presented by this appeal it is urged that this Court should entertain the instant appeal and hear arguments in this case with *Batchelor v. Stein*. Although the *Batchelor* case does not raise the constitutional issues in terms wholly identical to those involved here the situations are sufficiently similar to require the noting of an appeal in this case. While the *Batchelor* case involved federal intervention and the enjoining of a state obscenity statute it lacks the serious restraints imposed upon the distribution of a newspaper evident in the case at bar. Thus we urge the reasons are all the more compelling in this case for hearing our cause.

This Court has held that the distribution of any form of literature, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer *in an adversary proceeding*. *Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrants*, 367 U. S. 717 (1961); *The Lee Art Theater, Inc. v. Virginia*, 392 U. S. 636 (1968).

Thirty-eight years ago this Court warned the states that any previous restraints imposed upon the dissemination of any form of writing or speech which infringes upon freedom of expression is to be especially condemned. *Near v. Minnesota, ex rel. Olson*, 283 U. S. 697 (1931).

State officials have been continually admonished by this Court that the imposition of any prior restraints on the circulation of literature ". . . comes to this Court bearing a heavy presumption against its constitutional validity". *Bantam Books Inc. v. Sullivan*, 372 U. S. 58 at p. 70 (1963). Thus, it is clear under these authorities, that the states are not free to adopt whatever procedures they please for the enforcement of their obscenity laws without regard to their effect upon constitutionally protected speech.

In order to properly balance the public's right to enjoy a given form of expression against the state's right to prosecute obscenity, the adversary hearing was devised as a means of effectively adjusting these countervailing interests. Thus, today it is well settled, that an adversary hearing is a necessary constitutional predicate to the restraining of the circulation of any reading material.

It makes no difference whether the restraint imposed is caused by the state's seizure of certain publications (*Quantity of Books v. Kansas, supra*) or by the confiscation of a motion picture film (*Tyrone v. Wilkinson*, 410 F. 2d 639 [4th Cir. 1969]) or by arresting a person for the sale of a particular book (*Delta Books Distributors, Inc. v. Cronvich*,[10] Civ. 68-1927 [E. D. of La. July 14, 1969]) or by threatening that certain sanctions may be imposed if certain books are distributed (*Bantam Books, Inc. v. Sullivan, supra*) or by placing police officers in a bookstore

[10] The *Delta Book* case is precisely in point. There a three-judge court including Judges Boyle, Wisdom and Rubin held that retail book distributors could not be arrested without a prior adversary hearing.

to surveil the sales (*Bee See Book, Inc. v. Leary*, 291 F. Supp. 622 [S. D. N. Y. 1968]).

These cases teach us that once it is foreseeable that certain governmental action will restrain the free circulation of reading material, a prior adversary hearing on the issue of obscenity is constitutionally required.

An *ex parte* prior judicial determination of the alleged obscenity of the challenged work does not satisfy this constitutional requirement. *Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Potwora v. Dillon*, 386 F. 2d 75 (2nd Cir. 1967); *Tyrone v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969). For, as this Court has pointed out, only in an adversary hearing will the investigating magistrate be adequately advised of the challenged publication's legal propriety. Without such a hearing, conducted in an adversary atmosphere, books may be criminally charged, causing their sales to cease, thus making the public the real loser when later the books may be found to be constitutionally protected.

The record below clearly demonstrates a concerted effort on the part of the New York City police to stifle the distribution of *The Review* and the other underground newspapers by extrajudicial means. Significantly, newsstand dealers were only told that they could not sell the so-called underground newspapers and only those news dealers who handled those newspapers were arrested and threatened by the police. This comprehensive and menacing police campaign was focused solely on the tabloid newspapers instead of obscenity generally.

The Review's drop in circulation from 35,000 to 5,000 can only be attributed to the unleashing of this raw police power on the newsstands of New York City. This case presents a clear cut, concerted effort, on the part of the

state to suppress a newspaper, which has never been adjudicated obscene in an adversary hearing, by using the power of the state, in the form of massive arrests and threats of prosecution to inhibit its circulation.

The police are not excused from this unconscionable conduct simply because a criminal court magistrate, in an *ex parte* proceeding, examined some of these publications and determined that there was probable cause for the arrest of those responsible for its distribution. The procedure of an *ex parte* judicial investigation was expressly rejected in *Quantity of Books v. Kansas, supra.*

The District Court's suggestion that the appellants pursue their remedies in the state courts shows a misunderstanding of our grievance. Appellants' claim was not that they could not receive a fair or speedy trial in the state courts. Their complaint is that unless these illegal activities of the police are enjoined, before their newspaper perishes, their success in the criminal courts may be of no avail. In other words, appellants may win all of the battles in the state courts but still lose the war because of the newspaper's ultimate defeat by reason of the unlawful restraints inflicted upon it. The appellants have taken refuge in the Federal Court because that is the only court authorized to enjoin state officers from persisting in these unlawful practices. As a practical matter existing state remedies were found to be totally inadequate by the Second Circuit in *Potwora v. Dillon*, 386 F. 2d 75 (2nd Cir. 1967).

In *Dombrowski v. Pfister*, 380 U. S. 479 (1965) this Court acknowledged that often criminal prosecutions involve imponderables ". . . that themselves may inhibit

the full exercise of First Amendment freedoms . . . ". There the Court went on to point out that:

> The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . [f]or 'the threat of sanctions may deter . . . almost as potently as the application of sanctions' * * * The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospect of its success or failure. 380 U. S. 486, 487. (See also, *United Steel Workers of America v. Bagwell*, 383 F. 2d 492 [4th Cir. 1967].)

The restraints imposed upon this small newspaper go far beyond any ever seen by this Court before. For here, by reason of these police tactics, *The Review* is on the verge of perishing. Clearly, an adversary hearing in all likelihood would have avoided the massive arrest of newsstand dealers who were taken into custody without the benefit of arrest warrants. Such a hearing in all probability would have avoided, at the very least, the arrests of those responsible for the publication of *The Review*, described by *News Week Magazine* as the best of the underground newspapers.

The procedural lessons learned from *Quantity of Books v. Kansas, supra,* which are simple enough to apply, continue to be ignored by state officials and within the last year a number of courts have strayed from the moorings of this landmark decision. See *Rage Books Inc. v. Leary*, 301 F. Supp. 546 (S. D. N. Y. 1969); *Astro Cinema Corp. Inc. v. Mackell*, 69 Civ. 778 (E. D. N. Y. August 19th, 1969); *The East Village Other Inc. v. Koota*, 68 Civ. 125 (E. D. N. Y., February 13th, 1968). (Where a number of district courts have held an adversary hearing was unnecessary as a predicate to the imposition of restraints upon various forms of expression.)

The unconstitutional practices exemplified by this case and those cited above, always get their first footings by slight deviations from approved legal procedures. These encroachments into the precincts of protected speech can only be avoided by strict adherence to this Court's clearly defined rule, requiring a prior adversary hearing before the circulation of literature can be disturbed.

The situation is thus one where New York prosecutors and police need to be reminded that the constitutional standards and protections announced by this Court in *Quantity of Books v. Kansas, supra*, are applicable to the case at bar and have not been relaxed or repealed. The decision below, in short, will undoubtedly be taken by state prosecutors as a signal that this Court's prior decisions respecting First Amendment protections no longer need be respected or followed. Such a decision is bound to invite widespread abuses which under the First Amendment simply cannot be tolerated.

The only effective way to guarantee to a citizen the benefits of this procedural safeguard is by enjoining state officers from acting without observing it. By the time the appellants have a trial on their complaint in this action or litigate their criminal cases in the criminal courts—it will be too late. For by then their newspaper may well be destroyed.

For all of these reasons the Court should hear this appeal and the judgment of the Federal District Court should be reversed.

II. Section 235 of the New York Penal Law violates the First Amendment to our Federal Constitution because it fails to contain the standards established by this Court for judging obscenity and because it includes a presumption which substantially interferes with the defendant's presumption of innocence and privilege against self-incrimination.

In *Redrup v. New York,* 386 U. S. 767 (1967) this Court held that where a publication was not sold to a juvenile, or published in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, nor pandered, that "the distribution of the publication . . . is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, *in personam or in rem*". (386 U. S. at p. 769).

While the *Redrup* case was pending, this Court's docket had become cluttered with a large number of obscenity cases, involving a wide variety of materials, which were awaiting decision. After the advent of the *Redrup* decision, on June 12th, 1967 this Court, by its per curiam action in all of these pending cases, swept away some fifteen obscenity convictions, holding constitutionally protected a wide range of materials including paperback novels, nudist and girly magazines, and motion picture films.[11]

In each of these cases the given form of expression had not been sold to a minor, foisted upon an unwilling public or pandered.

By this Court's sweeping action we were left with the inescapable conclusion that any magazine, book, photograph, or motion picture film; which is not sold to a minor, or foisted upon an unwilling public or pandered is con-

[11] This Court's Journal of Proceedings, United States Law Week, June 12th, 1967, Vol. 35 at pp. 3433 through 3436.

stitutionally proctected.[12] This conclusion, drawn from the *Redrup* opinion and the *per curiam* opinions that followed, was confirmed on April 7th, 1969 when this Court decided *Stanley v. Georgia*, 394 U. S. 557, 89 S. Ct. 1243 (1969). Although this Court specifically held in *Stanley* that mere possession of obscenity cannot be made criminal, it went on to state:

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* or any other decision of this Court reaches that far. 394 U. S. at p. , 89 S. Ct. at p. 1247.

This Court there suggested that the state's powers to regulate obscenity must be confined to ". . . obscene material [which] might fall into the hands of children . . . or that [which] . . . might intrude upon the sensibilities or privacies of the general public". 394 U. S. at p. , 89 S. Ct. at p. 1249.

Thus, in light of this Court's holdings, it seems clear that the states' power to restrict what the public may read is constitutionally limited to those materials which are either sold to a minor, pandered, or foisted upon an unwilling public. Absent one of these factors the public's right to read what it pleases cannot be intruded upon by the states.

This Court also acknowledged in *Stanley* that the right to possess what is conceded to be obscene, must be accom-

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[12] United States District Court for the District of Maryland sitting *en banc* reached the same conclusion in *United States v. 4,400 Copies of Magazines*, 276 F. Supp. 902 (1967); see also *United States v. 127,295 Copies of Magazines*, 295 F. Supp. 1186 (D. Md. 1968); *Grant v. United States*, 380 F. 2d 748 (9th Cir. 1967); *Poulas v. Rucker*, 288 F. Supp. 305 (M. D. Ala. 1968).

panied by the right to receive such material. The Court in *Stanley* stated:

> This right to receive information and ideas, regardless of their social worth, . . . (citing authorities) is fundamental to our free society. 394 U. S. at p. , 89 S. Ct. at p. 1247.

The right to possess and receive would be meaningless without the corresponding right to sell and distribute absent, of course, a sale to a minor; pandering of the merchandise; or foisting it upon an unwilling member of the public.

When this Court spoke of the state's interest in controlling the distribution of obscenity it could have only had in mind those areas previously defined in *Redrup, i.e.*, sale to minors; pandering of a publication or foisting it upon an unwilling public. For to say that a person has a right to possess and receive obscenity but that he cannot buy it would be to emasculate that right.

Since Section 235 of the New York Penal Law lacks these strict limitations and makes criminal the sale to adults of materials deemed by the state to be obscene, it unconstitutionally interfers with the public's right to ". . . receive information and ideas, regardless of their social worth . . .". The only form of a state obscenity statute which can now pass constitutional muster under *Stanley v. Georgia* is one whose limitations on the distribution of obscenity are strictly confined to sale to minors; pandering; or the foisting of material upon an unwilling public. Since the New York statute fails to contain these requirements it is constitutionally deficient and must be so declared.

The Presumption of Knowledge

Section 235.10 of the New York Penal Law provides in part:

> A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

Under this statutory presumption the burden of proof is shifted to the defendant and he must come forward and prove that he did not have knowledge of the publication's contents and character.

In *Leary v. United States*, 395 U. S. 6 (1969), this Court discussed in some detail the constitutional validity of such a statutory presumption. Quoting from one of its earlier cases, this Court restated the rule by which the constitutionality of such a presumption must be measured as:

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. 89 S. Ct. at p. 1546."

Employing that test, this Court struck down the presumption relating to a defendant's knowledge of illegally imported marijuana contained in Section 176(a) of Title 21 of the United States Code as being unconstitutional.

Applying that same test to the case at bar, it is clear that there is absolutely no rational basis for presuming that

a bookstore owner, news dealer, wholesaler, or for that matter publisher, would know the contents of all of the books he sells, distributes or publishes. On the contrary the more rational presumption is that a newsdealer, bookstore owner, distributor or publisher would have no knowledge of the contents or character of all of the material that he sells, distributes or publishes.

It is illogical, irrational, and unreasonable to presume that the owner of a bookstore knows the contents of every book on his premises or that a distributor has knowledge of everyone of more than what might be a million books located in his warehouse or for that matter that a publisher knows the content and character of the hundreds of books that he may publish every year.

The Court below avoided this question by claiming there had not been a sufficient factual investigation of the logic of such a presumption as was apparently done in the *Leary* case. It is urged that no such factual investigation was necessary for common sense tells us a bookstore owner or distributor could not possibly have knowledge of all of the books on his premises. The unlikelihood of such knowledge formed the very basis of this Court's decision in *Smith v. California*, 361 U. S. 147 (1959).

Conclusion

The right to publish a newspaper and its availability to the public cannot be made to depend upon the popularity of the ideas it expresses. To be sure, what *The Review* had to say, for the most part, displeased those in places of authority. But when men in this country were given the right, under our First Amendment, to freely speak their minds, it was expected that their speech would not always be agreeable to those in power.

There is no way of telling how many critics of our democracy are needed to help keep it vital. We do know that there have never been enough. *The Review* is one of a dwindling number of dissenters. On the other hand, the "silent majority" has never sought nor needed this Court's help. *The Review*, whose very life is at stake here, does seek this Court's protection. To turn away from them now will, in effect, give legal sanction to what was done here and will inevitably have an anguishing impact upon a free press.

The terrorizing of these newsdealers by the police, in an effort to wipe out this newspaper, offers an ominous omen of what will come if these practices are not judicially supervised. For the real danger to a free people, in approving these police tactics, lies not so much in the regrettable loss of one more dissenter, but in what it may silence and leave unsaid by others who disagree with our government's policies. We must have a free press for all or we may ultimately have it for none.

For all of these reasons it is urged that the questions presented by this appeal are substantial and deserve to be heard by this Court.

Respectfully submitted,

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APPENDIX

Decision of United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILKY WAY PRODUCTIONS, INC., *et al.*,
Plaintiffs,

against

HOWARD R. LEARY, *et al.*,
Defendants.

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69 Civ. 3638

NEW YORK FEED CO., INC., *et al.*,
Plaintiffs,

against

HOWARD R. LEARY, *et al.*,
Defendants.

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69 Civ. 3808

Appearances:

Ralph J. Schwartz, Jr., Esq., New York, New York, Attorney for Plaintiffs, Milky Ways Productions, Inc., *et al.*

Herald Price Fahringer, Esq., Buffalo, New York, Attorney for Plaintiffs, New York Feed Company, Inc., *et al.*

Hon. J. Lee Rankin Corporation Counsel of the City of

New York, Attorney for Defendant, Howard R. Leary, Irving Gerstman, Esq., Of Counsel.

Hon. Frank S. Hogan, District Attorney of New York County, *Pro Se*.

Michael R. Juviler, Esq., Assistant District Attorney, Herman Kaufman, Esq., Assistant District Attorney, Of Counsel.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York.

Charles A. LaTorella, Jr., Esq., Assistant Attorney General of the State of New York, Of Counsel.

Before:

Feinberg, Circuit Judge, and Murphy and Frankel, District Judges.

FRANKEL, D. J.

This three-judge court has been convened to consider applications for injunctive and other relief by plaintiffs in two consolidated cases who assert that their rights under the First Amendment, as it applies via the Fourteenth, are being infringed by state arrests and prosecutions on obscenity charges.

In one case plaintiffs are Milky Way Productions, Inc., and two of its officers, engaged in publishing a weekly tabloid called "Screw, The Sex Review." The other suit is brought by New York Feed Company, Inc., and Stephen Heller, who published a bi-weekly tabloid entitled "The New York Review of Sex & Politics." Defendants in both cases are Howard R. Leary, Police Commissioner of New York City, and Frank S. Hogan, New York County District Attorney.

The publishers of "Screw", in their complaint filed August 18, 1969, charge that defendants, in May of 1969,

"embarked upon a plan and series of acts the purpose and effect of which has been to suppress the public sale of several issues of subject tabloid newspaper and to deprive the public of its right to read the tabloid and now threatens to suspend completely the publication and dissemination of subject tabloid." Specifically, it is charged, plaintiffs Goldstein and Buckley were arrested in May and charged with violating New York Penal Law § 235.05[1] by promoting Issues No. 14 and and No. 15 of "Screw." Thereafter, the complaint continues, the plaintiffs were advised by their counsel that "the only real basis to justify the arrests" was found in certain pictures, and they "proceeded in subsequent Issues to eliminate those pictures which apparently were deemed or appeared to be most objectionable."

Nevertheless, it is alleged, Goldstein and Buckley were arrested again on June 26, 1969, again on charges under § 235.05, because of their Issue No. 17. At the same time, "the distributor and several newsdealers" were arrest for promoting this issue. Moreover, plaintiffs charge, since May 21 "defendants, and particularly members of the Police Department, told, advised and threatened newsdealers and others that they would be arrested for selling any Issue of the publication Screw, including, of course, Issue No. 18 which was not subject to any process, civil or criminal."

As a result of these official actions, plaintiffs allege, sales of their Issues 18 and 19 have dropped from a former level of 75,000 to about 17,000. And this has happened, they say, even though "defendants * * * are or should be fully aware that Issues No. 17, 18, 19, 20 * * * did not and

[1] "A person is guilty of obscenity when, knowing its content and character, he * * * [p]romotes, or possesses with intent to promote, any obscene material * * *." Effective September 1, 1969, the statute was amended in minor respects not pertinent here.

do not contain pictures falling within the definition of hard-core pornography, to wit: pictures showing a consummated sexual act."

The complaint goes on to allege "still further arrests" on August 15, 1969, for promoting Issues 22 through 24.

According to the complaint, defendants have been asked, but have refused, to employ alternative procedures, such as civil injunctions or informal advance consultations with plaintiffs, in lieu of criminal charges under the obscenity statute.

As a result of the acts alleged, plaintiffs say, their business is being destroyed and First Amendment freedoms are being chilled. Allegedly lacking any other adequate remedy, they seek (in addition to damages) injunctive and declaratory relief of kinds, and on grounds, more particularly stated below.

Plaintiffs in the second case, publishers of "The New York Review of Sex & Politics," plead a similar cause, with some variations. On June 20, 1969, they allege, plaintiff Heller, "among others," was charged with violating Penal Law § 235.05 on the basis of the "Review's" Issue No. 9. In addition to Heller, Alvin Druss, principal of a distributing company, and "a number of newsstand dealers" (not named) are alleged to have been arrested. Circulation of the "Review" has dropped from 40,000 to 30,000. 193 newsstands carried it before June 20, but the number has since decreased to about 75. It is alleged that Heller was arrested again on August 15, 1969, this time for Issue No. 12 of the "Review." On this occasion, it is alleged, "some 70 or less [sic][2] newsstand dealers, some of whom are blind,

[2] The adverb apparently licensed suggest that the word "less" pushes the approximation too far for accuracy.

others who are handicapped and disabled," were also arrested. Unlike the complaint about "Screw," that concerning the "Review" makes much of the allegedly "tasteful" and otherwise valuable aspects of the publication, but this dubiety turns out to have little or no significance for purposes of the questions before us.

The alleged pattern of arrests, said to be pursued "recklessly and promiscuously," is assailed as an "effective prior restraint" forbidden by the Federal Constitution. Moreover, plaintiffs allege, with arrests being made before there has been an adversary ruling on obscenity, "defendants are acting in bad faith in that they are attempting to accomplish, and are in fact accomplishing, by extra judicial means what could not be achieved if the legal processes were followed." As in the companion case, plaintiffs connected with the "Review" seek both damages and injunctive relief.

By motions returnable on September 16, 1969, both sets of plaintiffs have applied for relief *pendente lite*. While the motions are not identical, the sum total of the relief sought and the contentions raised by both may be outlined as follows:[3]

(1) Temporary injunctions are sought

(a) to forbid arrests unless there has first been an adversary hearing before a judicial officer to determine whether the publications in question are obscene;

[3] Neither plaintiff joins in all the arguments or prayers of the other. The "Review" plaintiffs, for example, did not move initially for declaratory relief. The "Screw" plaintiffs have not joined in the attack upon the statutory presumptions, considered under "IV," *infra*. It simplifies things a little, however, and harms no one, to cumulate the several subjects in a single summary and treat them *seriatim* later on.

(b) to require that defendants negotiate and "pinpoint" alleged qualities of obscenity before instituting criminal proceedings;

(c) to forbid threats of arrest or warnings by police officers to newsdealers that sale of the publications will or may lead to arrest.

(2) Declaratory rulings are requested invalidating N. Y. Penal Law § 235 in several respects hereinafter detailed.

(3) Likewise, a declaration is sought that §§ 148-150 of New York's Code of Criminal Procedure are unconstitutional facially and as applied because they assertedly allow suppression of publications as "contraband" without a prior adversary hearing, contrary to the claimed protections of the First and Fourteenth Amendments.

(4) The convening of a three-judge court is urged—successfully, as this opinion indicates.

Defendants for their part have been permitted to cross-move for dismissal of the complaints, plaintiffs having waived the normal notice requirements.

In the papers filed for and against the motions, the broad outlines of the complaints are retraced, but with some notable modifications and additions. The alleged dates of arrests and the affected issues of the two publications are confirmed in the affidavits. The total of arrests appears to be sharply diminished; despite the bland assertion of undocumented numbers in plaintiffs' papers (with no detail and no ultimate weight even as affidavits go), we are able to find not more than 13 arrests for all affected issues of "Screw" and 5 for the affected issues of the "New York Review."

As against the complaint allegations that plaintiffs are being crushed by delayed vindication of their First Amendment rights, it has been shown without dispute that plaintiffs have acquiesced since May and June in the postponement of the pending state criminal proceedings. They have neglected during a summer and beyond to press for their right to speedy state adjudications or even to raise in the state courts the issues of constitutional law they want this court to decide.

Upon the foregoing facts, for reasons which follow, we have concluded that plaintiffs' motions must fail but that their complaints, if only narrowly, should survive defendants' motions to dismiss.

I.

Assuming in plaintiffs' favor a negative answer to the question whether 28 U. S. C. § 2283[4] applies to cases like this one, *cf. Dombrowski v. Pfister*, 380 U. S. 479, 484 n. 2 (1965); and see *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175, 1178 (S. D. N. Y. 1969), appeal pending, no sufficient case is made for an injunction. To begin with, plaintiffs' claim founders because they cannot show the extraordinary need required to justify such rare interferences with state criminal processes. Their heavy burden is to demonstrate that this is one of the "exceptional cases" where this kind of relief is essential "to prevent irreparable injury which is clear and imminent * * *." *Douglas v. City of Jeannette*, 319 U. S. 157, 163 (1943); and see cases collected in *Richardson v. Dudley*, 295 F. Supp. 181, 185 (S. D. N. Y. 1969) (three-judge court). The burden is not met by plaintiffs

[4] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

such as these who have had an available state forum for their claims over a period of three or four months, have been entitled to speedy adjudications in that forum, *Freedman v. Maryland*, 380 U. S. 51 (1965), and have chosen simply to bypass that avenue of relief in favor of seeking federal intervention,[5] If such delay and disregard of state processes pending the arrival of self-inflicted "emergencies" could meet the test for a federal injunction, the abrasive device would promptly lose its "exceptional" character and would become a commonplace irritant.

Apart from the problem of fatal delay, plaintiffs' prayer for an injunction lacks the central element of *Dombrowski*, the basic case they invoke—namely, a substantial indication of "bad faith" in the pending state prosecutions. See *Cameron v. Johnson*, 390 U. S. 611, 619 (1968); *id.* at 623 (dissent); *Robinson v. Bradley*, 300 F. Supp. 665, 667 (D. Mass. 1969) (three-judge court). While there is a passing allegation of "bad faith" in the moving papers for "Screw" (Schwarz affidavit at 8), and the same phrase appears in the "Review" complaint (par. 34), the plaintiffs consistently deny that they must show "bad faith" prosecution. It is evident, moreover, that their use of the quoted words has a special and inapposite meaning—to describe the omission of adversary proceedings before arrest, which is a separate subject to be considered below.

In any event, the requisite bad faith has not been shown. In fact, beginning with the prosecutions of the "Screw"

[5] Plaintiffs do not show inadequacy of the state procedures in any material sense. *Cf. Potzsora v. Dillon*, 386 F. 2d 74 (2d Cir. 1967). They say that vindication of their attacks upon the state statutes in the pending criminal cases will not serve to terminate or prevent other prosecutions. In the absence of a demonstration that defendants would persist in proceeding upon invalidated statutory premises, we should not and will not assume it. This is sufficient answer even apart from our doubts that the state scheme of remedies is as barren as plaintiffs say it is.

people in May, the papers and the oral submissions give a convincing picture of careful, discriminating prosecutions in *good faith*. Counsel have been enormously circumspect on the subject, but the strong inference from what they do say is that the copies of "Screw" underlying the May charges closely approached the badlands of "hard-core pornography."[6] Similarly, there is nothing beyond bald assertion to indicate that defendants have brought charges or made arrests based on issues of the "Review" while knowing their accusations could not be sustained.[7]

This leaves the prayer for declaratory relief, a distinct subject under cases like *Zwickler v. Koota*, 389 U. S. 241 (1967), and *Cameron v. Johnson*, 390 U. S. 611 (1968). The cited decisions indicate that declaratory relief may be available even if an injunction is not where non-frivolous claims of vagueness or overbreadth are lodged against a statute touching First Amendment freedoms. Even those decisions, however, leave largely intact the long-standing

[6] Tying this to their argument that the prosecution ought to arrange a system of advisory opinions, plaintiffs in the *Milky Way* case tell us they realized there were pictures in the May issues which could lead a good faith prosecutor to a determination of hard-core pornography. This was remedied, plaintiffs tell us. They proceed then to submit copies of the latter, supposedly "purified" issues, which have also led to prosecutions, but none of the May numbers. The later items before us, whether "obscene" or not (which we are not asked to decide), contain noticeable amounts of naked people, flaunted genitalia, and suggestive postures, all in an environment of sophomoric smut that somebody may have thought to reflect liberated sophistication. Anatole France may not have deserved the strictures, but Mr. Justice Holmes would not even have wasted on this stuff the observation that this "sex talk has none of the charm of really felt lubricity." 1 *Holmes-Laski Letters* 414 (Howe, ed., abr., Atheneum 1963). Since we have not been told in September what was in the admittedly lustier pages of May, we find no joy or utility in guessing. It is enough that the whole picture reflects nothing to suggest the "hopeless" prosecution solely for harassment which is the essence of *Dombrowski*-style bad faith.

[7] Further claims for injunctive relief have been noted and found frivolous, at least on the showing now before us. The alleged pattern or "scheme of "threats" is not even adumbrated by the scattered (and disputed) instances reported by affiants who appear to have been shouting the assertedly repressive remarks. The contention that prosecutors must consult or negotiate before bringing obscenity charges—whether or not the idea might point toward a useful form of collaboration—is without basis in constitutional law.

declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank*, 333 U. S. 426, 431 (1948), quoted in *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 462 (1952). There is no indication that every issue in a state proceeding affecting areas of First Amendment concern is an automatic candidate for duplicative and potentially conflicting decision in a concurrent federal suit for declaratory relief.[8]

In an effort to harmonize the general principles of discretion with the special forms of First Amendment protection implemented by *Zwickler* and *Cameron*, we conclude that the safeguards of vagueness and overbreadth—available to any suitor within the seeming reach of the state enactment, *N. A. A. C. P. v. Button*, 371 U. S. 415, 432 (1963); *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940); *Winters v. New York*, 333 U. S. 507, 518-20 (1948)—are permissible for declaratory relief. Cf. *Robinson v. Bradley*, *supra*, 300 F. Supp. at 369. On this thesis, we will render a declaration on the subject covered under Point II, *infra* (facial unconstitutionality of Penal Law § 235). For comparable reasons, we regard the claimed right to an adversary hearing before arrest (Point III, *infra*), but not the complex mix of fact and law involved in the contention that the presumptions in Penal Law § 235.10 must be deemed "irrational" and therefore unconstitutional (Point IV).

[8] It is suggested that both *Zwickler* and *Cameron* may well be distinguishable in that neither involved long-pending state proceedings like the one here. There may be *pending* state case at all, but only a threat, requiring a conversion by state counsels and leaving the problem [illegible] involved. In *Cameron* state arrests on [illegible] by those of the federal suit three days later

II.

The substantive portions of Penal Law § 235 are attacked on three grounds, all of which we hold to be mistaken.

(1) The main claim is that the definition of "obscene" in § 235.00(1) is invalid on its face because it embodies only the three "tests" set out in *Memoirs v. Massachusetts*, 383 U. S. 413, 418 (1966), as derived from *Roth v. United States*, 354 U. S. 476 (1957), and intervening cases. Two more "tests," plaintiffs assert, were added by *Redrup v. New York*, 386 U. S. 767 (1967)—that there be "pandering" and "foisting upon an unwilling public."

Plaintiffs misread the *per curiam* opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential "tests" are only *permissible* kinds of relevant *evidence* which may serve in a close case to tip the balance toward a finding of obscenity. The basic thought appears first in separate opinions of Chief Justice Warren. See *Roth*, 354 U. S. at 495 (concurring opinion); *Jacobellis v. Ohio*, 378 U. S. 184, 201 (1964) (dissent). It takes firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering the Court's judgment in *Memoirs*, *supra*, where he said (383 U. S. at 420):

> "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."

The idea reaches full bloom with Mr. Justice Brennan's majority opinion in *Ginzburg v. United States*, 383 U. S. 463, 470-473 (1966) (evidence of "pandering is relevant to the application of the *Roth* test" *id.* at 471)."

Nothing in *Redrup* changes the scope or effect of these added "tests." There is no support in that or any other decision of the Supreme Court for the view that they must be satisfied *in addition* to the three tests of *Memoirs* before a finding of obscenity is permissible. The standard as laid down in *Memoirs* was cited with approval as recently as *Stanley v. Georgia*, 394 U. S. 557, 568 (1969). For a view of the precedents similar to ours, see *United States v. 37 Cartons of Magazines*, 300 F. Supp. 851, 853-54 (N. D. Cal. 1969).

It bears mention, however, that plaintiffs are not alone in their contrary thinking. In *United States v. Four Copies of Magazines, Etc.*, 276 F. Supp. 902 (D. Md. 1967), the five Judges of the District of Maryland, sitting *en banc*, unanimously ruled for the claimant in a condemnation case under section 305 of the Tariff Act of 1930, 19 U. S. C. 1305, on the explicit ground that *Redrup* has added cumulative, and therefore narrowing, "tests" of obscenity. While it found the magazines before it the lewdest it had ever considered, appealing more blatantly than any before to prurient interest, and devoid of social value, the Court held it impossible to sustain forfeitures for obscenity. Explaining what it saw as the decisive impact of *Redrup*, the Court said (at 904):

"Mr. Justice Harlan, dissenting in *Redrup*, read the majority views as the 'simplest test * * * is constitutional doctrine' rather than 'a statutory gloss * * *.' *Id.* at 771-772. He evidently does not help the plaintiffs here. The effect of the doctrine as he saw it *vel non* was to provide an avenue toward a finding of obscenity which would otherwise not exist. He found it serving, in other words, to narrow, not broaden, the area of First Amendment protection. There is no basis for a position that state legislatures are required to incorporate such restrictive approaches in their statutes regulating obscenity.

"It appears * * * that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.

"Since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed—(a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.

"This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in *Ginzburg v. United States*, 383 U. S. 463 at 465-466, 467, 470-471, 474-476, 86 S. Ct. 942, 16 L. Ed. 2d 31, they would not be entitled to the protection of the First Amendment. See *Pinkus-Alberg v. State*, 1 Md. App. 591, 232 A. 2d 264, 271 (1967)."

See, likewise, *United States v. 127,295 Copies of Magazines, Etc.*, 295 F. Supp. 1186, 1188-89 (D. Md. 1968) (Thomsen, C. J., and Northrop, J.); and see *Grant v. United States*, 380 F. 2d 748 (9th Cir. 1967); *Paulos v. Rucker*, 288 F. Supp. 305, 307 (M. D. Ala. 1968) (interpreting *Redrup*, and the reversals without opinion in its wake, "as indicating that it is indeed a rare book that, solely on the basis of its content, is not entitled to constitutional protection").

Having attended respectfully to the apparent holdings in the Maryland District Court and the somewhat parallel

observations elsewhere, we adhere to the position that the New York statute survives the opinion of *Redrup*.[19]

(2) We can give shorter shrift to the argument that the New York State Legislature was bound to limit its proscriptions to "hard-core pornography" after the decision in *People v. Richmond News*, 9 N. Y. 2d 578, 216 N. Y. S. 2d 369 (1961), which so confined the statute then in effect. The Federal Constitution nowhere commands any such state judicial supremacy. The States are free, of course, by whatever organs they chose, to give wider freedom for expression than the First and Fourteenth Amendments require. See *Mishkin v. New York*, 383 U. S. 502, 507-508 (1966); Paulsen, *State Constitutions, State Courts, and First Amendment Freedoms*, 4 Vand. L. Rev. 620, 642 (1951); *cf. Johnson v. New Jersey*, 384 U. S. 719, 733 (1966). They are not perpetually bound by experiments in that direction.

(3) The attack upon § 235 as void for vagueness is frivolous. *Roth v. United States* sustained the bare word "obscene" against a similar assault. See 354 U. S. at 491-92. New York's detailed definition renders its statute more clearly impregnable.

III

The argument that there must be an adversary hearing before an arrest for obscenity is made in two forms: (1) as an attack on N. Y. Code Crim. Proc. §§ 148-150, an asserted subject for three judges, and (2) as a simple claim of official lawlessness, cognizable by one judge. Version No. (1) invites us to an area that "abounds with slippery

[19] At the same time, we find enough in the way of utterly respectable disagreement to reject defendants' idea that plus three judge court be dissolved because no question of sufficient substance instituted its convening.

distinctions," Wright, *Federal Courts* 164 (1963)—namely, "between a petition for an injunction on the ground of the unconstitutionality of the statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court." *Ex parte Bransford*, 310 U. S. 354, 361 (1940). In the view we have taken, since there is three-judge jurisdiction on other grounds (see note 10, *supra*), we need not wade into this morass. See *Florida Lime Growers v. Jacobsen*, 362 U. S. 73, 80-81, 84 (1960), and cases there cited. Accordingly, we can and do go directly to the asserted requirement of a preliminary adversary hearing and decide the essentially identical question under either formulation—whether such a novelty is mandated by the First Amendment.

While what plaintiffs propose is indeed a relative "novelty," their argument is not without arguable connection to established principles. Plaintiffs rely upon the decisions which have condemned mass, or broadly effective, seizures of allegedly obscene writings without a prior adversary hearing. *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrant*, 367 U. S. 717 (1961); *Bethview Amusement Corp. v. Cahn*, ___ F. 2d ___ (2d Cir. 1969); *Tirone, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7th Cir. 1968). A "prior restraint" is also effected, plaintiffs say, when arrests are made—particularly multiple arrests for promoting the same publication—because this inhibits others from continuing to distribute the materials. And so, the argument concludes, there must be an adversary hear-

ing and judicial determination preceding the inception of the criminal process.

The argument is not merely plausible; it has won approval in several courts. *Delta Book Distributors v. Cronin*, Inc., ___ F. Supp. ___ (E. D. La. 1969) (three-judge court); *Combat Films, Inc. v. State of Illinois*, 292 F. Supp. 185 (N. D. Ill. 1968); *Sokolic v. Ryan*, Civ. No. 2501 (S. D. Ga., 8-18-69).[*] But decisions we believe to be sounder, at least in the present state of learning, go the other way. *Tarnac, Inc. v. Wilkinson*, 410 F. 2d 639 (4th Cir. 1969); *Bare Books Inc. v. Leary*, 301 *F. Supp.* 546 (S. D. N. Y. 1969), appeal pending; *Astro Cinema Corp., Inc. v. Mackell*, 68 Civ. 778 (E. D. N. Y., 8-19-69); *The East Village Other, Inc. v. Kuh*, 68 Civ. 125 (E. D. N. Y., 2-13-68). In the respect here pertinent, we join the latter group.

It is of interest in this connection, if by no means, decisive, that plaintiffs' theory, if accepted, would have invalidated both federal and state convictions under obscenity statutes which have in the recent past been upheld by the Supreme Court. *Ginsberg v. New York*, 390 U. S. 629 (1968); *Mishkin v. New York*, 383 U. S. 502 (1966); *Ginzburg v. United States*, 383 U. S. 463 (1966). A point of greater importance, both as a matter of legal history and practical judgment, is the fact that the prior adversary proceeding plaintiffs demand would not serve to eliminate either the "chill" or the "prior restraint" against which they contend. It does not appear that there were any arrests in the present cases before a judicial officer had scrutinized the materials and determined that warrants

[*] The fact in the cited cases is distinguishable from ours in that each involved arrests coupled with seizures of allegedly obscene material. No seizures occurred in the cases before us. Nevertheless, as is highlighted by Judge Rubin's partial dissent addressed to this aspect of the *Delta Book Distributors* case, the court in each instance was persuaded to enjoin further criminal proceedings in addition to granting separable relief from the unlawful seizures.

should issue. All that, like the proceedings of a grand jury, was accomplished *ex parte*—without either the possible benefit to the accused or the potentially "chilling" effect upon others of adversary proceedings. The result, at least in terms of history, is to avoid any traditional form of "prior restraint" because the first overt impact upon the allegedly protected area comes at a time when all the protections and favorable presumptions of the criminal process are available to the defendant. *Cf. Near v. Minnesota*, 283 U. S. 697, 713-14 (1931).

This is not to blink at the undeniable fact that arrests and prosecutions are likely to deter activities of the kind against which they are directed. The very existence of criminal sanctions for forms of expression, especially when the standards of liability are such vexed questions at the highest judicial levels, must have some appreciable tendency of the same type. See *Smith v. California*, 361 U. S. 147, 154-55 (1959). The point remains that the inhibitions are not avoided by the new procedure plaintiffs want; they are, if anything, pushed back to an earlier time of open contest when the burden of litigation and a species of readier "defeat" are likely to work their deterrent effects.

It is inappropriate, we think, to "weigh" (assuming we could) the relative impact of familiar criminal procedures against the innovation plaintiffs seek. It seems sufficient for our purposes that the supposed virtues of the departure they urged are not at all apparent and are directly antithetical to all pertinent indications in the Supreme Court's pronouncements implementing the First Amendment. The net effect of those expressions suggests that traditional criminal prosecutions, with their procedural safeguards, are surely permissible, and very possibly preferred, vehicles for enforcing bans against obscenity. See

Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 69-70 (1963); *id.* at 72-73 (Douglas, J., concurring); *Freedman v. Maryland*, 380 U. S. 51, 58-59 (1965); *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 441-43 (1957); *Near v. Minnesota*, 283 U. S. 697, 713-15 (1931). *Bantam Books, supra*, upon which plaintiffs rely, reminds us specifically that procedures short of prosecution, intended as potential substitutes, may be less acceptable than the standard proceeding that begins with complaint, information or indictment as the first, non-adversary determination.

At any rate, we find no warrant in the First Amendment or the cases that give it full meaning for compelling the radical change plaintiffs seek in state (and, presumably, federal) criminal procedures affecting obscenity cases.

IV.

Plaintiffs New York Feed Company and Stephen Heller make the contention (not made by the *Milky Way* plaintiffs) that N. Y. Penal Law § 235.10 is unconstitutional because it contains the following presumptions:

> "1. A person who promotes obscene material, or
>
> "2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same."

The argument is made in brief, bland, conclusory terms, merely citing *Leary v. United States*, 395 U. S. 6 (1969), for the general test of presumptions, but offering no semblance of factual material of the kind essential to such a submission. We do not reach the merits of what may be,

on proper submissions in a proper forum, a subject of some interest.

The question tendered under this heading relates to the "rationality"—the sufficient probability—of a posited relationship between one fact (or set of facts) and another. *Tot v. United States*, 319 U. S. 463, 466-67 (1943); *United States v. Romano*, 382 U. S. 136, 138-39 (1965); *United States v. Gainey*, 380 U. S. 63, 66-67 (1965). The problem is "highly empirical" in its nature. *United States v. Gainey, supra*, 380 U. S. at 67. Its solution entails the exploration of facts which a legislature has either investigated or otherwise learned about, *id.* at 65; *Leary v. United States, supra*, 395 U. S. at 38, and which judges cannot notice or pretend to know better merely because of their isolated offices. So, for example, in *Leary*, upon which plaintiffs pitch this contention, the Court explored reams of factual material (*id.* at 39-43, 45-52), and relied upon a district court *record* made before a judge concerned with the same problem. *Id.* at 42, 43, 48, 50, 51, 53.

Here, plaintiffs merely assume facts, contrary to what the New York Legislature assumed, and announce the latter's irrationality. This does not begin to sustain their position. To mention only one other ally of the Legislature, the American Law Institute, not regularly charged with irrationality, adopted some years ago presumptions which are substantially like the ones here and which very likely are the source of the latter. ALI, Model Penal Code § 251.4(2), Proposed Official Draft, p. 238 (1962); *id.* § 207.10 (5), (7), Tent. Draft No. 6 at 3-4 (1957); see N. Y. Penal Law § 235.10, Practice Commentary (McKinney's 1967).

The decisive point for our purposes is that the question is not a suitable one for federal declaratory relief when

if is open in state proceedings which have been pendi
for several months. This is not a clear, unalloyed, "pure
question of law like vagueness or overbreadth. It is n
a question on which there is no possibility "of a constru
tion by the state courts that would avoid or modify th
constitutional question." *Zwickler v. Koota*, *supra*, 38
U. S. at 249. It is, instead, a question on which factua
investigation may serve as a basis for judicial interpreta
tions and definitions which are proper for state judges
not for us. *Cf. Richardson v. Dudley*, 295 F. Supp. 181
184-85 (S. D. N. Y. 1969). Depending upon what the facts
reveal (for example about the practices of news dealers
in selecting items for sale), the state courts might conclude
that the presumption of knowledge applies only to speci
fied classes of those who deal in allegedly obscene things,
not to all who might be thought within the literal reach of
the naked statutory text. This seems, in short, to be a clear
occasion for abstention, and we follow that still open and
appropriate, if lately somewhat straitened, course.

V

The views expressed thus far imply an obvious prediction
that plaintiffs have only a faint hope of prevailing in any
aspect of their claims. We recognize, moreover, that
these cases are probable additions to those that wither and
die before trial unless plaintiffs prevail in their motions
for preliminary relief. These considerations do not lead
us, however, to the granting of defendants' motions to
dismiss. There remain broad, if unpromising, allegations
of bad faith. There are charges of threats and harassment
which, however empty they seem thus far, are not de
stroyed on the papers before us. And the alleged waves of
arrests, while they too remain largely unsupported, as of
now, are conceivably capable of more effective proof. Given

the liberality with which we must construe complaints as assailed by Rule 12 motions to dismiss, we conclude that the sound course is to deny the motions.

To summarize: plaintiffs' motions are in all respects decided upon the foregoing findings and conclusions pursuant to Fed. R. Civ. P. 52(a). The motions to dismiss are also denied. The purposes for which this three judge court was convened having been accomplished, the court is hereby dissolved.

It is so ordered.

Dated: New York, New York October 15, 1969

WILFRED FEINBERG,
United States Circuit Judge.

THOMAS F. MURPHY,
United States District Judge.

MARVIN E. FRANKEL,
United States District Judge.